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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FERDINAND MARCOS, IMELDA MARCOS, AND RAMON AZURIN,

Petitioners,

v.

REPUBLIC OF THE PHILIPPINES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the act of state and political question doctrines bar adjudication of the conduct of the former President of the Philippines while in office.

2. Whether principles set forth in *United Mine Workers v. Gibbs* justify the exercise of jurisdiction over pendent claims arising predominantly under foreign law and authorize reliance on such pendent claims as the basis for the issuance of an injunction not available under federal law.

3. Whether a federal court may enter an injunction operating extraterritorially without weighing comity considerations.

4. Whether a foreign government has standing to bring a civil suit on its own behalf and/or as the representative of its citizens under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c).

LIST OF PARTIES

Other parties named in this action are Lloyd's Bank of California (now the Sanwa Bank), Krodo Properties, N.V., Al Djebel Corporation and Gregorio Araneta. Originally named as defendants but later dismissed were Antonio O. Floirendo, Diosado C. Ordonez, Ancor Holdings, N.V., and Calno Holdings, N.V.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Ferdinand E. Marcos, Imelda R. Marcos, and Ramon Azurin respectfully pray that a writ of certiorari issue to review the decision and judgment of the Court of Appeals for the Ninth Circuit entered in this case on December 1, 1988.

OPINIONS BELOW

The opinion of the Ninth Circuit, sitting *en banc*, is reported at 862 F.2d 1355 and is reproduced in the Appendix at 1a. The opinion of the original panel of the Ninth Circuit is reported at 818 F.2d 1473 and appears at 33a. The order of the District Court for the Central District of California is appended at 96a.

JURISDICTION

The judgment of the Ninth Circuit was entered on December 1, 1988. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves 18 U.S.C. §§ 1961 *et seq.*, included in the Appendix at 142-156a.

STATEMENT OF THE CASE

Petitioner Ferdinand E. Marcos is the former President of the Republic of the Philippines. Imelda R. Marcos is his wife, and Ramon Azurin is an aide to them.

On February 26, 1986, after a period of turmoil in the Philippines, the U.S. government brought petitioners and their entourage to the United States. Concomitant with the departure of petitioners, Corazon Aquino assumed power in the Philippines.

One of the first acts of the Aquino government was to initiate litigation in the United States against the Marcoses. Various organs of the Philippine government filed suits in Hawaii, New York, New Jersey, Texas, and California.

The Philippine government, through its Presidential Commission on Good Government, filed the instant action, based on alleged violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"), on June 16, 1986. Unlike most of the previous suits, which sought the return of specific property located in the United States, this one sought a wide array of compensatory damages, many of them trebled under 18 U.S.C. § 1964(c), and various forms of equitable relief, affecting property located primarily outside the United States. The complaint also requested $50 billion in punitive damages. The Philippines alleged that it had

standing to advance the extensive claims "in its own right" and "[a]s the representative of its people, who were victimized by Defendants' unlawful acts, conspiracies, schemes, and acts of racketeering." The predicate acts alleged to confer federal jurisdiction were the transportation of stolen property in connection with the movement of property when President and Mrs. Marcos were brought to Hawaii, and mail and wire fraud associated with the purchase of U.S. properties. The complaint also included pendent claims, alleged to arise under California law, for alleged breach of fiduciary duty, conversion, fraud, and breach of implied contract arising from President Marcos's performance as head of state of the Philippines.

The District Court entered a preliminary injunction prohibiting petitioners and all those "in active concert or participation" with them from transferring or liquidating property held anywhere in the world by or on behalf of President and Mrs. Marcos. The District Court held that the complaint sufficiently alleged the existence of a RICO enterprise and a pattern of racketeering to justify RICO jurisdiction. The District Court further held that the danger of dissipation of defendants' assets pending trial warranted the issuance of a preliminary injunction. The basis for the issuance of the injunction, however, was not the RICO statutes, which in the Ninth Circuit do not authorize injunctive relief for civil litigants, but rather the pendent claims.

Petitioners appealed to the Ninth Circuit. A split panel reversed. In an opinion by Judge Kozinski, the panel held that the Philippines had no probability of success on the merits, since its complaint inextricably implicated the act of state doctrine. The panel, noting that the Philippines' reliance on a net worth theory to prove misdeeds by the Marcoses was fatal if the court were unable to judge the legality of some of the Marcoses' al-

leged acquisitions, determined that many of the acts complained of by the Philippines, such as the expropriation of property and the creation of public monopolies, could not be adjudicated, since the acts involved the exercise of governmental power. The panel further held that the political question doctrine barred adjudication of the suit, given the lack of judicially manageable standards by which to pass judgment on President Marcos's rule under martial law. One judge concurred in part and dissented in part; while agreeing with the portion of the majority opinion concerning the act of state and political question doctrines, she disagreed that RICO provided jurisdiction for the suit, since the complaint failed to allege racketeering activity having a material effect on the U.S. economy. Another judge dissented from the act of state and political question section of the opinion.

The Ninth Circuit agreed to rehear the case *en banc*. The United States filed an *amicus* brief, the crux of which was that the District Court failed to address adequately the relationship between the federal claims and pendent state and foreign law claims and comity concerns implicated by the extraterritorial application of the injunction.[1] In addition, the United States questioned whether the doctrine of *forum non conveniens* was applicable. The United States also deemed the record incomplete to judge the extent to which the case involved the act of state doctrine.

The *en banc* panel affirmed the issuance of the preliminary injunction. The majority of the panel concluded that the act state doctrine was no bar to adjudication of the suit; that the court was competent to undertake an evaluation of the legality under Philippine law of acts taken by President and Mrs. Marcos; that the allegations of RICO jurisdiction were sufficient; that the common

[1] The full text of the *amicus* brief is appended at 105a.

nucleus of operative fact between the RICO claims and pendent state and foreign claims warranted the exercise of pendent jurisdiction; and that since the preliminary injunction operated *in personam* as opposed to *in rem*, "there [was] no reason to be concerned about its territorial reach."

Three judges dissented in part. Disagreeing with the majority's conclusions regarding the application of the act of state doctrine, they concurred with the view of the United States that the record should be developed more fully to permit consideration of the relevance of the doctrine. Two of the three dissenters also disputed the basis for pendent jurisdiction and the propriety of the scope of the injunction, which they characterized as "unprecedented in its breadth."

REASONS FOR GRANTING THE PETITION

I. Certiorari Should be Granted to Review Whether the Act of State and Political Question Doctrines Bar Adjudication of the Conduct of the Former President of the Philippines While in Office

This case involves an attempt by a foreign government to have a U.S. federal court investigate and adjudicate the propriety of acts taken by the foreign government's former President during his twenty year tenure in office. The case requires not only a determination of whether the allegations of corruption associated with the exercise of governmental authority are true, but also an evaluation of the legality of such acts under foreign law. This Court should consider whether the act of state and political question doctrines permit resolution of such a case.

A. Act of State Doctrine

While modern decisions of the Court have delineated the contours of the act of state doctrine within the con-

text of expropriation cases,[2] the Court has yet to address the scope of the doctrine in cases in which the complaint alleges corruption associated with the performance of official duties by a foreign government official. Because previous pronouncements of the Court offer little guidance, and in light of the confusion exhibited in lower court decisions concerning the application of the act of state doctrine in such cases, review by this Court is appropriate.

The basic proposition of the act of state doctrine, that a U.S. court will not pass judgment on the acts of a foreign sovereign completed within its own territory, *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), has not been eroded by recent decisions. Lower courts have reached conflicting conclusions, however, on the extent to which the act of state doctrine bars inquiry into the motivations of foreign government officials in implementing governmental acts. Several courts have determined that the act of state doctrine does not prevent investigation into whether the decisions of foreign governments in granting contracts were influenced by bribery of foreign officials. *See, e.g., Williams v. Curtiss-Wright Corp.*, 694 F.2d 300 (3rd Cir. 1982); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3rd Cir. 1988), *petition for cert. filed* (No. 87-2066); *Industrial Investment Development Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980); *see generally* Note, *Recent Decision: International Law—Act of State Doctrine: An Emerging Corruption Exception in Antitrust Cases?*, 59 Notre Dame L. Rev. 455 (1984). On the other hand, other decisions refuse to question the reasons or motivations underlying governmental acts, on the grounds that such inquiries "would be the very

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[2] *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

sources of diplomatic friction and complication that the act of state doctrine aims to avert." *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 110 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *accord Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Hunt v. Mobil Oil Co.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

The extent to which adjudication of this case requires judicial scrutiny of the governmental acts of a foreign sovereign makes the case an appropriate vehicle for Court resolution of the conflict in the Circuits on the application of the act of state doctrine where corruption is alleged. The Philippine government has alleged a panoply of misdeeds by President and Mrs. Marcos, spanning their entire twenty year tenure in office. These misdeeds primarily involve allegations of bribery and kickbacks associated with acts unquestionably governmental in nature, such as the granting of official monopolies, contracts, licenses, and franchises, and the expropriation of private property. Moreover, adjudication of the legality of the alleged misdeeds connected with the governmental acts is compelled by the net worth theory relied upon by the Philippine government. This theory, used in lieu of tracing specific misdeeds to specific pieces of property, involves a comparison of President and Mrs. Marcos's net worth at the time they assumed office with their alleged net worth after their departure from the Philippines. As pointed out by the original panel, establishing liability under such a theory (and justifying an injunction affecting property located throughout the world allegedly owned by the Marcoses) requires proof that all of the Marcoses' income not attributable to their salary was acquired illegally. Yet, such a theory fails if the court is unable to judge the legality of the receipt or

acquisition of particular income or assets. Every act of the Marcoses that impacted their net worth, therefore, is at issue in this case. (46-47a).

A related inquiry for the Court is to provide guidance on the extent to which a U.S. court must scrutinize a complaint to determine whether resolution of plaintiff's claims would require adjudication of the acts of foreign sovereigns. This Court previously has not hesitated to dismiss a case on act of state grounds at the pleading stage if the complaint demonstrated that the essence of the act alleged to be tortious was governmental in nature. *See, e.g., American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (affirming dismissal of antitrust suit because "it is impossible to adjudicate this matter without sitting in judgment on the right of Costa Rica [the defendant's alleged co-conspirator] to do what was done"). Moreover, other courts have analyzed a complaint extensively to determine whether the acts complained of, though apparently nongovernmental when viewed separately, are so interwoven with governmental acts as to require dismissal under the act of state doctrine. *See, e.g., Hunt v. Mobil Oil Co.*, 550 F.2d at 76 ("Since the nexus [between defendants' actions and Libyan expropriation of plaintiffs' oil operation] is at the heart of the claim we do not understand how Judge Weinfeld could have erred in anticipating that the doctrine of act of state was inescapably raised by the pleadings"); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d at 406-408 (affirming dismissal of suit alleging that corporate defendant obtained oil concession by bribing foreign officials).

By contrast, the *en banc* panel failed to undertake such an examination. Ignoring the original panel's recitation of the allegations of the complaint which implicated the act of state doctrine, the *en banc* panel stated that the "Marcoses offered no evidence whatsoever to support the classification of their acts as acts of state.

The burden of proving acts of state rested upon them." (9a). Without such proof, the court concluded, the act of state doctrine did not apply on the present record.

Other courts in recent years apparently have shared the view of the *en banc* panel that the act of state doctrine be evaluated after presentation of evidence by the defendant. *Republic of Philippines v. Marcos*, 806 F.2d 344, 359 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 2178 (1987); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d at 1062. Such courts either have abandoned any effort at analyzing the complaint to determine whether governmental acts are essential to adjudication of the plaintiff's complaint, or they have treated the issue as an affirmative defense, to be pled and proven by the defendant, regardless of whether the defense is made out by the complaint. The Court should weigh whether the latter cases are consistent with the mandate of *American Banana Co.* and its progeny, and consider generally whether the treatment of the act of state doctrine as an affirmative defense is compatible with the operation of the act of state doctrine as an abstention doctrine.

The final aspect of the act of state doctrine for which the Court should grant review concerns the application of the doctrine in a case in which a foreign sovereign is the party seeking relief and against whom the doctrine is asserted. The *en banc* panel stated that the act of state doctrine loses vitality in such a case: "[*a*] *fortiori*, when a ruler's former domain has turned against him and seeks the recovery of what it claims he has stolen, the classification has little or no applicability." (9a). Similarly, the Second Circuit stated that "when a state comes into our courts and asks that our courts scrutinize its actions, the justification or application of the doctrine may well be significantly weaker." *Republic of Philippines v. Marcos*, 806 F.2d at 359. This Court has stated, however, that the foreign policy implications of a law-

suit are magnified, not diminished, when the plaintiff is a foreign sovereign:

> The sensitivity in regard to foreign relations and the possibility of embarrassment of the Executive are, of course, heightened by the presence of a sovereign plaintiff. The rebuke to a recognized power would be more pointed were it a suitor in our courts.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 437; *see also Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940). It is no answer to say that the passage from *Sabbatino* is inapposite because the Cuban government, rather than the defendant, was attempting to invoke the act of state doctrine in that case. A claim of act of state by the defendant rather than a plaintiff sovereign state does not vitiate the act of state doctrine; it only alters the focus of possible embarrassment. In a traditional act of state case, U.S. courts are hesitant to judge the acts of a foreign government for fear that a judicial declaration that such acts are illegal will complicate foreign relations. In this case, as pointed out in the panel opinion, judicial hesitation should arise from the possible injury to the United States' relations with the Philippines should a U.S. court find that petitioners' activities were in full conformity with Philippine law. As recognized by the Court in *Sabbatino*, this situation is akin to that presented when a foreign government seeks recognition in U.S. courts of its penal laws. 376 U.S. at 437. In the latter situation, U.S. courts refuse to even consider the claims of the foreign government. *Id.; see Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979) (declining to enforce Canadian tax judgment). The Court should weigh whether the effort of the Philippine government to have a U.S. court adjudicate the conduct of its former President while in office requires a similar prophylactic rule.

B. Political Question Doctrine

Underscoring the concerns over adjudicating a case such as this are the uncertain legal principles necessary to its resolution. To that extent, the Court should consider whether dismissal is appropriate not under the act of state doctrine, but rather under the political question doctrine.

As enunciated by the Court, among the factors evincing a political question is "a lack of judicially discoverable and manageable standards" for resolving a case. *Baker v. Carr*, 369 U.S. 186, 217 (1962). The original panel opinion concluded that such standards were absent, as President Marcos's invocation of martial law gave him dictatorial powers that defy judicial examination. As the panel bluntly stated:

> Offensive as such absolute government may be to our sense of justice, no legal restraints can prevail against dictatorial power. A dictator can do whatever he can get away with. A court of law in this country simply cannot second-guess how that power is exercised.

(66a). The *en banc* court disagreed with the panel's conclusion, and held the political question doctrine to be inapplicable:

> The court will be examining the acts of the president of a country whose immediate political heritage is from our own. Although sometimes criticized as a ruler and at times invested with extraordinary powers, Ferdinand Marcos does not appear to have had the authority of an absolute autocrat. He was not the state, but the head of the state, bound by the laws that applied to him. Our courts have had no difficulty in distinguishing the legal acts of a deposed ruler from his acts for personal profit that lack a basis in law.

(10a).

The *en banc* opinion on this issue contains two fundamental misperceptions. The first is that President Marcos's powers were constricted by an established body of law. The powers he enjoyed were more than "extraordinary," they were absolute. As noted by the original panel, President Marcos ruled by edict for much of his tenure under the authority of martial law. The Philippine government has not provided any decision of its courts stating that the powers available to President Marcos under martial law were subordinate to other Philippine legal principles. Moreover, there are no principles of customary international law providing guidance on the issue; to the contrary, the very nature of martial law has been subject to conflicting interpretations. "[T]he term 'martial law' carries no precise meaning . . . It has been employed in various ways by different people and at different times." *Duncan v. Kahanamoku*, 327 U.S. 304, 315 (1946).

The *en banc* court, perhaps aware of the lack of standards by which to judge the exercise of martial law, justified resorting to U.S. legal principles under the guise of a common heritage between the U.S. and Philippine legal systems. This presumption, having no evidentiary basis and wholly inappropriate for judicial notice, represents at best misguided paternalism and at worst an attempt to force U.S. concepts of fiduciary duty on a foreign sovereign. In a similar case, involving an attempt by the Khomeini regime to have a New York court place a constructive trust on property throughout the world alleged to have been acquired by the Shah of Iran with misappropriated funds, the court queried whether such an approach was proper: "do we have the right to impose our concepts of the responsibility of public office on the activities within a foreign country of its absolute monarch?" *Islamic Republic of Iran v. Pahlavi*, 464 N.Y.S.2d 487, 489 (1983), *aff'd on other grounds*, 62 N.Y.2d 474, 467 N.E.2d 245 (1984), *cert. denied*, 469 U.S. 1108 (1985). The court concluded that

the issues inherent in such questions looked "like the 'political thicket' out of which courts should stay." *Id.*

Even assuming that the *en banc* opinion properly presumed that the powers of martial law granted to President Marcos were subordinate to the Philippine Constitution, the issue remains of the constitutional principles to be applied. The *en banc* court's second misperception was its rather blithe assumption that the determination of Philippine constitutional law would not be "beyond the capacity of our courts." (9a). Yet, this Court should consider whether the capacity of U.S. courts should include the interpretation of foreign constitutions. As noted by the original panel, Article VII, § 17 of the Philippine Constitution, in effect during the relevant time period, provides immunity for official acts taken by a President during his tenure in office.[3] While a U.S. court may be competent to define the word "official" in the context of the U.S. Constitution, it is improper to presume a similar result under the Philippine Constitution. Indeed, as the original panel stated, the undertaking of such an effort would be tantamount to a Philippine court resolving *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). (64a).

II. Certiorari is Necessary to Review the Propriety of Exercising Pendent Jurisdiction to Enter an Injunction Addressed to Foreign-Based Conduct Separate From the RICO Jurisdictional Facts

Three important issues emerge from the *en banc* panel's sweeping ruling on pendent jurisdiction, some or all of which merit the Court's review. First, the overwhelming predominance of foreign pendent claims in-

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[3] The provision reads:

> The President shall be immune from suit during his tenure. Thereafter, no suit whatsoever shall lie for official acts done by him or by others pursuant to his specific orders during his tenure.

vites questions not sufficiently addressed by the factors set out in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Second, the *en banc* panel's failure to resolve the *amicus* United States' concerns over the remoteness of the factual link between the U.S.-based RICO claims and the largely foreign-based pendent claims runs counter to the factual analysis required by *Gibbs*. Third, the court's affirmance of a worldwide injunction predicated on state and foreign law claims having little if any relation to the RICO claims undermines Congressional intent to deny injunctive relief to civil RICO litigants.

A. Pendent Jurisdiction Over Foreign Law Claims

The Court should review whether the *Gibbs* factors apply with equal force to a situation in which the pendent claims arise principally under foreign, not state, law.[4] Several considerations suggest the need for a different analysis. For example, foreign law often is the product of a legal culture alien to U.S. courts, thus making a "surer-footed reading" of it more difficult. *See Gibbs*, 383 U.S. at 726. Unlike state courts, which have coexisted with federal courts for two hundred years, foreign courts may find gratuitous U.S. court interpretation of their laws offensive. Unlike state courts, which have an obligation to enforce judgments entered by federal courts, foreign courts may be reluctant to recognize U.S. court judgments arising from cases having no obvious connection to the United States and involving interpretations of foreign law. Indeed, foreign courts may be openly hostile to judgments entered by a U.S. court bear-

[4] Prior to this case, it appears that only one court has addressed this issue. In that instance, the court relied on the factors set forth not in *Gibbs*, but rather in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), in determining that exercising jurisdiction over foreign law claims would offend notions of comity. *Vespa of America Corp. v. Bajaj Auto Ltd.*, 550 F. Supp. 224, 227-30 (N.D. Cal. 1984).

ing little nexus to the United States and affecting property within the foreign court's jurisdiction.

B. Relationship Between Federal and Pendent Claims

Even if the factors set forth in *Gibbs* are applicable in this instance, the analysis performed by the *en banc* court merits review, as indicated by the position of the *amicus* United States. Although asked to address only act of state issues, the United States instead devoted much of its brief to stating its concern over the dangers inherent in the District Court's expansive use of pendent jurisdiction:

> The bulk of plaintiff's claims are contained in "state law" counts, which appear, in fact, to arise under the substantive law of the Philippines or perhaps other nations. . . The record before the district court, which did not include any detailed specification of the factual basis for the bulk of the nonfederal claims, did not make it possible even to analyze the extent to which those claims are properly before the court. First, it is not clear to what extent the bulk of plaintiff's nonfederal claims arise from a "common nucleus of operative fact" with the federal claims, as required for the exercise of pendent jurisdiction. Moreover, on the present record, it is not clear that the nonfederal claims will not so overwhelm the federal claims as to make federal jurisdiction inappropriate. The fact that the claims appear to arise largely under foreign law may also weigh against the exercise of pendent jurisdiction.

(118-119a). Three dissenting judges of the *en banc* court agreed. Judge Schroeder criticized the majority's failure to insist on a showing that the RICO claims relating to alleged criminal activity in the United States "arise in any way from the same allegedly wrongful transactions through which the Marcoses acquired other property located elsewhere." (18a). Noting the inevitable tension between the limited nature of federal court jurisdiction and the concomitant desire to try all related

claims in one proceeding, the dissent voted to vacate the injunction because so much of the property alleged to have been stolen, converted, diverted or misappropriated by the Marcoses is, by plaintiff's own admission, located outside the United States and has no apparent relation to the property alleged to be the fruits of RICO activity.

The Philippines' varied claims not only lack the "common nucleus of operative fact" required by *Gibbs*, but also are not such that the Philippines "would ordinarily be expected to try them in one judicial proceeding." 383 U.S. at 725. Plaintiff's own litigation activity against the Marcoses disproves that element. As noted by the dissent, the Philippine government has filed numerous proceedings around the world, including the United States, to recover allegedly stolen property located in those jurisdictions. (26a). Even absent such multidistrict activity, however, this case does not fit within the *Gibbs* model. As stated succinctly by the dissent:

> These are not such claims. The RICO claims allege violations of the United States' criminal laws through activities *in this country*. The pendent claims, on the other hand, encompass allegations of fraud and conversion stemming from the Marcoses' actions *in the Philippines* spanning a twenty-year period. Further, the bulk of the property claimed, according to the complaint, is located in Switzerland.

(25-26a) (emphasis added).

C. Propriety of Granting Injunctive Relief Based on Pendent Claims When the Federal Statute Conferring Subject Matter Jurisdiction Does Not Provide Such Relief

In addition to eviscerating the "common nucleus" requirement of *Gibbs*, the *en banc* decision blesses the use of pendent jurisdiction to issue a worldwide preliminary injunction in a case where the statute conferring federal

jurisdiction does not permit injunctive relief. Because of the confusion among lower courts regarding this issue, a writ of certiorari should be granted to address it.

The plain language of 18 U.S.C. § 1964 and its legislative history have been interpreted by the great majority of courts to preclude injunctive relief. *See, e.g., In re Fredeman Litigation*, 843 F.2d 821, 828-30 (5th Cir. 1988); *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1080-89 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987); *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 489 n.20 (2d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479 (1985); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983). To date, only a few district courts have concluded that injunctive relief is available in private RICO litigation. *See e.g., Aetna Casualty & Surety Co. v. Liebowitz*, 570 F. Supp. 908, 911 (E.D.N.Y. 1983), *aff'd on other grounds*, 730 F.2d 905 (2d Cir. 1984); *Chambers Development Co. v. Browning-Ferris Industries*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984). The Ninth Circuit in *Religious Technology Center v. Wollersheim*, in perhaps the most scholarly analysis of the issue, observed that while § 1964(b) expressly grants the government the authority to seek equitable relief,

> the inclusion of a single statutory reference to private plaintiffs, and the identification of a damages and fees remedy for such plaintiffs in part (c), logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs.

796 F.2d at 1083 (emphasis in original). The court in *Wollersheim* noted that RICO's legislative history reveals two instances when proposed amendments to RICO authorizing private injunctive relief were rejected by Congress. *Id.* at 1086 (one amendment withdrawn by Rep. Steiger; the other rejected by the House in the following

term). In *In re Fredeman Litigation*, the Fifth Circuit, in reaching result similar to *Wollersheim*, also noted that a recent decision of this Court, *Agency Holding Corp. v. Malley-Duff & Associates*, 107 S.Ct. 2759 (1987), supports the *Wollersheim* court's reliance on Rep. Steiger's withdrawal of his proposal for a private injunctive remedy. 843 F.2d at 830. Thus, little doubt exists that Congress intended that private litigants not be permitted injunctive relief under RICO.

The issue then arises whether courts should permit injunctive relief under pendent claims in RICO cases. Most courts confronted with the issue have endorsed the practice. *See, e.g., USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 97-98 (6th Cir. 1982); *Airline Reporting Corp. v. Barry*, 825 F.2d 1220, 1227 (8th Cir. 1987); *Federal Deposit Ins. Corp. v. Antonio*, 649 F. Supp. 1352, 1351 (D. Colo. 1986); *County of Cook v. Lynch*, 560 F. Supp. 136, 140-41 (N.D. Ill. 1982).

In analogous cases, however, courts have not permitted such a result. In cases in which federal question jurisdiction is based on Title VII, several courts have held that by providing only for equitable relief, Congress implicitly intended to preclude pendent jurisdiction over state claims seeking monetary relief. *See, e.g., Haroldson v. Hospitality Systems, Inc.*, 596 F. Supp. 1460, 1461 (D. Colo. 1984); *Frye v. Pioneer Logging Machinery, Inc.*, 555 F. Supp. 730, 732-35 (D.S.C. 1983); *Bennett v. Southern Marine Mgmt. Co.*, 531 F. Supp. 115, 117-18 (M.D. Fla. 1982); *Jong-Yul Lim v. Int'l Institute of Metropolitan Detroit, Inc.*, 510 F. Supp. 722, 725-26 (E.D. Mich. 1981); *but see Jones v. Intermountain Power Project*, 794 F.2d 546 (10th Cir. 1986). Another Circuit, while not addressing whether pendent claims were inherently incompatible with Title VII relief, exercised its discretion under *Gibbs* to decline to hear the state claims. Judge Scalia, writing for the D.C. Circuit, dismissed the pendent claims on the basis that the "great discrepancy between

the relatively limited equitable relief available under Title VII . . . and the much broader relief brought under appellants' state causes of action" made the state law claims "pendent to this Title VII litigation much as a dog is pendent to its tail." *Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 805-06 (D.C. Cir. 1984). Concern about the potential for obtaining broader relief by way of state law claims has been expressed by courts in other contexts as well. *See, e.g., Wesley v. John Mullins & Sons, Inc.*, 444 F. Supp. 117, 120 (E.D.N.Y. 1978) (pendent jurisdiction cannot be used to circumvent Congress' intent to limit liability under the Truth-in-Lending Act); *Hannon v. Continental Nat'l Bank*, 427 F. Supp. 215, 218 (D. Colo. 1977) (adjudication of state claims would result in broader remedies than those available under the Age Discrimination in Employment Act). This Court should weigh the imposition of similar limitations on pendent claims in private RICO actions.

III. The Court Should Grant Certiorari to Consider Whether a Federal Court May Grant Extraterritorial Injunctive Relief Without an Analysis of Possible Effects on International Comity

Much of the focus of the United States' *amicus* brief concerned the scope of the injunction issued by the District Court. Because the injunction affected persons and property outside the country, the United States questioned whether it created a potential for conflict with foreign governments. The *en banc* panel, however, ignored these comity concerns, as it concluded that because the injunction ostensibly operated *in personam* and not *in rem*, there was "no reason to be concerned about its territorial reach." (15a). In reaching this conclusion, the court quoted from *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) for the proposition that a district court "in exercising its equity power may command persons properly before it to cease to [sic] perform acts outside its territorial jurisdiction." (15a).

Far from supporting the *en banc* court's holding, *Bulova* requires the very comity analysis urged by the United States in its *amicus* brief. The full text of the quotation from *Bulova* is:

> Where, as here, there can be no interference with the sovereignty of another nation, the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction.

344 U.S. at 289 [citations omitted]. *Bulova* thus requires a finding of no interference with the laws of another nation before a district court may enjoin acts outside the United States. Consistent with its mandate, the Court made an inquiry in *Bulova* into whether the district court's issuance of an injunction was antagonistic to Mexican law and policies. By contrast, the *en banc* opinion contains no findings regarding interference with the sovereignty of other nations arising from issuance of the injunction.

The need for scrutiny of comity considerations is particularly acute in this case. The injunction is limited neither to identified property nor to identified countries; rather, it constrains any sale, transfer, or other disposition of property anywhere in the world alleged to be owned by President and Mrs. Marcos. Furthermore, it binds not only petitioners, but also all those in active concert or participation with them. (99a). Given the breadth of this injunction, the Court should review whether its issuance represents an exercise of judicial power in keeping with the dictate of *Bulova*.

IV. Certiorari Should be Granted to Review Whether the Philippine Government Has Standing Under RICO to Bring Suit on its own Behalf and as the Representative of its People

The *en banc* court held, without discussion, that a government body is a person within the meaning of 18 U.S.C. § 1961(3) and thus may bring suit under § 1964(c). It

concluded, without discussion, that "[t]he foreign nature of the Republic [of the Philippines] does not deprive it of statutory personhood." (3a). The court did not address at all whether its affirmation of the right of the Philippines to initiate suit as representative of its people was consistent with the requirement under § 1964(c) of an "injury to business or property." Moreover, there was no discussion of the conflict the court's holding creates with decisions from the Seventh and Second Circuits, which have held that government entities may not seek RICO relief for injuries to their citizens, and with an opinion of the Eighth Circuit, which imposes a similar limitation on foreign governments seeking relief under the antitrust statutes.

A. Right of any Sovereign to Seek Relief Under RICO

Several courts have assumed, without discussion, that a governmental entity has standing to bring suit under RICO. *See, e.g., Alcorn County, Mississippi v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160 (5th Cir. 1984); *County of Cook v. Lynch*, 560 F. Supp. 136 (N.D. Ill. 1982); *State of Maryland v. Buzz Berg Wrecking Co.*, 496 F. Supp. 245 (D. Md. 1980). Only one court appears to have analyzed the issue at length. In *Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985), the Seventh Circuit relied on the broad construction traditionally afforded the RICO statutes under precedent in the Circuit to uphold the right of a state tax agency to invoke RICO jurisdiction in a suit against a tax scofflaw. 771 F.2d at 317. Even then, the court agreed that "[p]rinciples of comity might suggest that the federal courts are not the proper place to pursue state tax collection claims," and it concluded with a hope that "this decision appears to Congress as the distress flag it is . . ." *Id.*

Other courts, however, have limited the right of government entities to seek relief under RICO. In *State of Michigan, Dep't of Treasury v. Fawaz*, 653 F. Supp. 141

(E.D. Mich. 1986), *aff'd mem.*, 848 F.2d 194 (6th Cir. 1988), the court expressly rejected the Seventh Circuit's holding in *Illinois Dep't of Revenue v. Phillips*, and dismissed an action brought by the Michigan Department of Treasury against a service station operator who was delinquent in payments of sales tax. The court reasoned that a contrary ruling would have "staggering" implications, primarily by encouraging state entities to use the federal court system as a mechanism for collection of state taxes, which it deemed inappropriate in light of the remedies available to the State under its own laws. *Id.*

B. The Capacity in Which Sovereigns May Sue Under RICO

The Second and Seventh Circuits, while implicitly accepting the right of government entities to initiate RICO actions, have restricted the types of injuries for which a government body may seek damages, thereby defining the capacity in which a sovereign may seek relief under RICO. In *People of State of New York v. Seneci*, 817 F.2d 1015 (2d Cir. 1987), the court, relying on *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982), held that the State of New York could not seek monetary damages under RICO for injury to the business and property of the State's citizens. In *People of State of Illinois v. Life of Mid-American Ins. Co.*, 805 F.2d 763 (7th Cir. 1986), the court agreed that the State of Illinois could not seek damages on behalf of a group of individual residents for alleged RICO activity. The court further stated that even if a proper *parens patriae* suit had been pled (i.e., one seeking relief for injury to quasi-sovereign interests), the logic of *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972), together with congressional action in amending the antitrust statutes, but not the RICO statutes, to permit suits of such a nature, precluded relief under RICO. 805 F.2d at 766-67.

In contrast, the *en banc* court, in upholding the right of the Philippine government to bring suit under RICO, made no distinction between those claims asserted by the Philippine government "in its own right" and those "[a]s the representative of its people, who were victimized by Defendants' unlawful acts, conspiracies, schemes, and acts of racketeering." Fairly read, the opinion represents an endorsement of RICO suits by any sovereign entity seeking damages for injuries to its own interests, to its quasi-sovereign interests, or to the particular interests of its citizens.

The *en banc* opinion also represents an interpretation of the requirement in § 1964(c) of an "injury to business or property" which is contrary not only to the Second and Seventh Circuit decisions, but also to the authority of *Hawaii v. Standard Oil Co. of California*. In this instance, the Philippine government has not suffered damage to its commercial interests; rather, it seeks damages for alleged misappropriation from its national treasury, receipt of kickbacks, bribes, and other forms of compensation in exchange for the grant of governmental favors, and the expropriation of private property. All of the alleged acts relate to governmental, not commercial, functions of the Philippine government, and many of the acts, such as the alleged receipt of bribes and kickbacks, have not been alleged to result in tangible deprivations of property belonging to the Philippine government. Indeed, the bulk of the Philippines' claims can be characterized as requests for damages for the alleged loss of the Philippine people's intangible right to good government. No judicial precedent has allowed such sweeping relief under either the antitrust or RICO laws.

The conflict spawned by the *en banc* decision cannot be reconciled on the basis that a foreign sovereign is entitled to greater standing than a domestic sovereign, as such an argument was expressly rejected in the analogous

antitrust arena. In *Pfizer, Inc. v. Lord*, 522 F.2d 612 (8th Cir. 1975), the Eighth Circuit determined that a foreign government could not pursue treble damage claims on behalf of its citizens for anti-competitive conduct. The court dismissed the argument that the logistical barriers which impair the ability of foreign individuals to bring claims in U.S. courts warranted permitting foreign governments to initiate suit on their behalf. *Id.* at 618-19. The court instead held that the proper avenue for the prosecution of suits brought in a representative capacity was Rule 23, Fed.R.Civ.P. *Id.* at 617-618.[5]

C. Standing of Foreign Governments

The conflict between the Eighth Circuit decision in *Pfizer* and the *en banc* opinion raises the fundamental issue of whether a foreign sovereign should have any standing under RICO. The *en banc* court, considering an issue of first impression in the courts, held in a single declaratory sentence that under the rationale of *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), the Philippine government was not deprived of statutory personhood under RICO. (3a).

In *Pfizer*, this Court could find no principled basis upon which to deny foreign governments standing to bring federal antitrust actions in federal court while granting this right to domestic sovereigns. 434 U.S. at 317. Several factors distinguish a RICO case such as this from *Pfizer*. First, the principal basis for the Court's holding that state governments (and thus foreign governments) are entitled to sue for treble damages under the antitrust statutes was an acknowledgement that a state had no alternate remedy. *Georgia v. Evans*, 316 U.S. 159, 162 (1942). The antitrust laws restricted criminal prosecutions to the U.S. government, and a state

[5] The ruling of the Eighth Circuit on this issue was not before this Court when it heard a later appeal in the same case. *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 310 n.3 (1978).

could not take action, such as the seizure of property, to redress violations of the statutes. *Id.*

By contrast, such a concern is not applicable in the RICO context. As noted in the *State of Michigan, Dep't of Treasury* case, a state entity has a variety of weapons to combat racketeering activity. 653 F. Supp. at 143. Nothing in the RICO statutes operates to impair or preempt the ability of a state to criminalize racketeering activity or to provide civil remedies in state court to victims, including itself, of such conduct. Indeed, this Court has stated conversely, that "under RICO, the States remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions." *United States v. Turkette*, 452 U.S. 576, 586 n.9 (1981).

Similarly, a foreign sovereign need not rely on § 1964(c) as the sole means of obtaining redress for injury caused by racketeering activity. This case does not involve a situation in which a foreign government has entered the U.S. marketplace as an ordinary consumer and has been victimized by U.S. corporations or citizens. To the contrary, the predicate acts were allegedly committed by citizens of the Philippines, including the head of state of the Philippines, with the Philippine government itself allegedly representing the RICO enterprise. The Philippine government accordingly has the right under international law to proscribe and punish such conduct. *See generally* Restatement (Third) of the Foreign Relations Law of the United States, § 402 (1987). Indeed, civil and criminal proceedings have been initiated in Philippine courts against the Marcoses. Access to the U.S. justice system, therefore, is not essential to the vindication of any claims by the Philippine government. In addition, given the penal nature of RICO treble damages,[6] and the extent to which establishing RICO predi-

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[6] *Tellis v. U.S. Fidelity & Guaranty Co.*, 805 F.2d 741, 746 (7th Cir. 1986), *vacated on other grounds*, 107 S.Ct. 3255 (1987);

cate acts in this instance requires proof of violations of foreign law, the Court should review whether allowing the Philippine government to pursue RICO claims against its own citizens represents an unwarranted enforcement of foreign penal laws. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 413-14, 421 (discussing traditional rule against enforcement of such laws).

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that a writ of certiorari issue to review the *en banc* judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Summers v. Federal Deposit Ins. Corp., 592 F. Supp. 1240 (W.D. Okla. 1984); *but see In re Nat'l Mortgage Equity Corp. Mortgage Pool Certificates*, 636 F. Supp. 1138 (C.D. Cal. 1986).